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**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

CENTER FOR BIOLOGICAL DIVERSITY)
and SIERRA CLUB,)
)
Plaintiffs,)
) Case No.: 3:19-cv-2462-RS
v.)
)
ANDREW R. WHEELER, in his official) **JOINT CASE MANAGEMENT**
capacity as Administrator, United States) **STATEMENT & [PROPOSED] ORDER**
Environmental Protection Agency,)
)
Defendant.)
)
)

1 Pursuant to Civil L.R. 16-9, the Standing Order for All Judges of the Northern District of
 2 California (effective November 1, 2018), this Court's Civil Standing Order – General, and the
 3 Court's Order of July 10, 2019 (Dkt. No. 16), Plaintiffs Center for Biological Diversity and
 4 Sierra Club (collectively, "Plaintiffs"), and Defendant Andrew R. Wheeler, in his official
 5 capacity as Administrator of the United States Environmental Protection Agency ("EPA"),
 6 jointly submit this Joint Case Management Statement and Proposed Order.

7 **1. Jurisdiction & Service**

8 This case is brought under the citizen suit provision of the Clean Air Act, 42 U.S.C.
 9 § 7604(a)(2), to compel mandatory actions by EPA that Plaintiffs allege are unlawfully overdue.
 10 Plaintiffs allege that this Court has jurisdiction over Plaintiffs' claims pursuant to 42 U.S.C.
 11 § 7604 and 28 U.S.C. §§ 1331 and 1361. Plaintiffs' position is that Plaintiffs have alleged and are
 12 prepared to prove all facts necessary to show they have Article III standing. EPA has not formed
 13 a view regarding whether Plaintiffs have standing because it lacks knowledge or information
 14 sufficient to form a belief with respect to the veracity of Plaintiffs' standing allegations.

15 EPA has been served.

16 **2. Facts**

17 This is a citizen suit to enforce statutory mandates under the Clean Air Act that require
 18 EPA to take certain regulatory actions as part of implementing the 2008 National Ambient Air
 19 Quality Standards ("NAAQS") for ozone. Compl. ¶ 1. Plaintiffs allege EPA failed to timely
 20 comply with its deadline for determining whether 12 areas of the country that were designated as
 21 "nonattainment" for ozone and classified as "moderate" under the 2008 NAAQS timely attained
 22 the standards. *Id.*; *see* 42 U.S.C. § 7511(b)(2)(A). The areas at issue in this case are Imperial
 23 County, CA; Mariposa County, CA; Nevada County (Western part), CA; San Diego County,
 24 CA; Phoenix-Mesa, AZ; Baltimore, MD; Chicago-Naperville, IL-IN-WI; Dallas-Fort Worth,
 25 TX; Greater Connecticut, CT; Houston-Galveston-Brazoria, TX; New York-N. New Jersey-Long
 26 Island, CT-NJ-NY; and Sheboygan County, WI. Compl. ¶ 5. The attainment deadline for the 12
 27 areas was July 20, 2018. *Id.* ¶ 3. The Clean Air Act further requires EPA to publish notice in the
 28 Federal Register identifying each area that EPA has determined under the Act as having failed to

1 attain 2008 NAAQS for ozone and identifying the reclassification, if any, described in the Act
 2 six months from the attainment deadline, *i.e.*, by January 20, 2019. 42 U.S.C. § 7511(b)(2)(B).
 3 Plaintiffs allege EPA failed to timely comply with that duty, as well. Compl. ¶ 5.

4 At the time Plaintiffs filed the Complaint, EPA had not taken final action with respect to
 5 the 12 areas identified in the Complaint. On August 7, 2019, however, EPA took final action for
 6 10 of the 12 areas identified in the Complaint: (1) Mariposa County, CA; (2) Nevada County
 7 (Western part), CA; (3) San Diego County, CA; (4) Baltimore, MD; (5) Chicago-Naperville, IL-
 8 IN-WI; (6) Dallas-Fort Worth, TX; (7) Greater Connecticut, CT; (8) Houston-Galveston-
 9 Brazoria, TX; (9) New York-N. New Jersey-Long Island, CT-NJ-NY; and (10) Sheboygan
 10 County, WI. 84 Fed. Reg. 44,238 (Aug. 23, 2019).

11 Of the two remaining areas, Imperial County, CA, and Phoenix-Mesa, AZ, to date, EPA
 12 has neither proposed action nor taken and published in the Federal Register notice of final action
 13 regarding Imperial County, CA, and EPA proposed to determine that the Phoenix-Mesa, AZ,
 14 ozone nonattainment area attained the 2008 ozone standard by its moderate area attainment date
 15 of July 20, 2018. 84 Fed. Reg. 27,566 (June 13, 2019).

16 3. Legal Issues

17 The parties do not dispute that EPA took on August 7, 2019, and published in the Federal
 18 Register on August 23, 2019, notice of final action regarding 10 of the 12 areas identified in the
 19 Complaint. The parties also do not dispute that EPA has failed to take final actions required
 20 under 42 U.S.C. § 7511(b)(2)(A) and (B) for Imperial County, CA, and Phoenix-Mesa, AZ. The
 21 parties anticipate that the only legal dispute will be the appropriate remedy—the schedule for
 22 EPA to complete its mandatory duties—for the Imperial County, CA and Phoenix-Mesa, AZ
 23 areas.

24 4. Motions

25 Counsel for EPA will shortly submit a joint request for counsel for all parties to appear at
 26 the initial case management conference by telephone.

27 To allow the parties to assess whether to engage in settlement discussions, and—if so—to
 28 engage in such discussions, the parties stipulated to, and the Court so-ordered, an enlargement in

1 EPA's time to answer and to continue the previously scheduled case management conference
2 and associated deadlines. Dkt. No. 16. EPA has not yet decided whether to engage in settlement
3 discussions. Plaintiffs intend to file a motion for summary judgment regarding the schedule for
4 EPA action regarding Imperial County, CA, and Phoenix-Mesa, AZ, if settlement negotiations
5 do not begin shortly or if they become protracted under the circumstances of this case.

6 The Court previously granted motions for *pro hac vice* admission for Plaintiffs' counsel
7 Seth L. Johnson and Isabel Segarra Trevino.

8 5. Amendment of Pleadings

9 At this time, Plaintiffs do not anticipate amendment of pleadings, though they reserve the
10 right to revisit the question of amendment.

11 6. Evidence Preservation

12 The parties have reviewed this Court's Guidelines for the Discovery of Electronically
13 Stored Information and have met and conferred regarding this matter. The parties do not believe
14 a plan for evidence preservation is needed at this time.

15 7. Disclosures

16 The parties do not believe that initial disclosures pursuant to Federal Rule of Civil
17 Procedure 26(a) are required at this time. The parties agree that discovery is not necessary at this
18 time, but the parties reserve their rights to seek discovery on the question of the appropriate
19 remedy and Plaintiffs' costs of litigation, if any.

20 8. Discovery

21 The parties expect that the anticipated motion for summary judgment will resolve all
22 outstanding issues in this case without the need for trial. The parties agree that discovery is not
23 necessary at this time and therefore have not developed or agreed to any discovery plan or
24 requested a discovery order at this time. The parties reserve their rights to seek discovery on the
25 question of the appropriate remedy and Plaintiffs' costs of litigation, if any.

1 9. Class Actions

2 This case is not a class action.

3 10. Related Cases

4 There are no related cases.

5 11. Relief

6 Plaintiffs intend to seek declaratory relief that EPA is in violation of its mandatory duties
7 described above regarding Imperial County, CA, and Phoenix-Mesa, AZ, and a Court order
8 compelling EPA to perform these mandatory duties by dates certain. Plaintiffs do not seek any
9 damages, but if they prevail, they may, in accordance with the applicable law, seek costs of
10 litigation, including expert and attorneys' fees.

11 12. Settlement and ADR

12 EPA has not yet determined whether to engage in settlement discussions in this case but
13 expects to come to a decision soon. Plaintiffs seek an expeditious deadline for EPA to correct its
14 ongoing noncompliance with mandatory Clean Air Act obligations, and wish this case to proceed
15 to resolution without unnecessary delay. Plaintiffs are willing to consider a settlement offer if
16 doing so will not unreasonably delay relief.

17 The parties have filed ADR certifications. Dkt. Nos. 17, 18. Counsel spoke by phone
18 about ADR on August 20, 2019. As the parties have litigated and resolved a number of similar
19 cases in the past, the parties do not currently believe that ADR will be helpful.

20 13. Consent to Magistrate Judge for All Purposes

21 Whether all parties will consent to have a magistrate judge conduct all further
22 proceedings including trial and entry of judgment. Yes No

23 14. Other References

24 The parties agree that this action is not suitable for reference to binding arbitration, a
25 special master, or the judicial panel on multidistrict litigation.

15. Narrowing of Issues

2 The parties do not believe that there is any potential to further narrow the disputed issues,
 3 except to the extent that EPA takes final action and publishes notice of it in the Federal Register
 4 regarding either of the remaining two areas subject to dispute in this case.

16. Expedited Trial Procedure

6 The parties agree that this is not the type of case that can be handled under the Expedited
 7 Trial Procedure of General Order No. 64 Attachment A.

17. Scheduling

9 The Initial Case Management Conference is set for Thursday, September 12, 2019 at
 10 10:00 a.m. All counsel seek to appear by telephone. Plaintiffs request that the Court enter the
 11 following briefing schedule. If EPA determines that it will engage in settlement discussions, the
 12 parties will promptly request an appropriate continuance of this briefing schedule to allow for
 13 settlement negotiations.

14 DeadlineDue Date

15 Plaintiffs' Motion for Summary Judgment

September 19, 2019

16 EPA's Opposition to Plaintiffs' Motion for
17 Summary Judgment

November 4, 2019

18 Plaintiffs' Reply in Support of Motion for
19 Summary Judgment

November 22, 2019

20 Hearing

TBD

21 18. Trial

22 The parties agree that instead of a trial the case can be decided on a motion for summary
 23 judgment.

24 19. Disclosure of Non-party Interested Entities or Persons

25 On May 7, 2019, Plaintiffs filed their Certification of Interested Entities or Persons (Dkt.
 26 No. 5). At that time, they indicated that they were not aware of any interested entities or persons,
 27 other than the named parties, and that remains true. Defendant, as an individual named in his
 28

1 official capacity as head of a government agency, is not subject to the disclosure requirements.
2 Civil L.R. 3-15(a).

3 **20. Professional Conduct**

4 All attorneys of record for the parties have reviewed the Guidelines for Professional
5 Conduct for the Northern District of California.

6

7 DATED: September 5, 2019

8 Respectfully Submitted,

9

10 */s/ Seth L. Johnson*
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Counsel for Defendant Andrew R. Wheeler

CASE MANAGEMENT ORDER

The above **JOINT CASE MANAGEMENT STATEMENT & [PROPOSED]**

ORDER is approved as the Case Management Order for this case, and all parties shall comply with its provisions.

IT IS SO ORDERED.

Dated:

HON. RICHARD SEEBORG

UNITED STATES DISTRICT JUDGE